No. 76-406

# In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES V. NAPOLI, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

JEROME M. FEIT,
ROBERT H. PLAXICO,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-12 to A-26) is reported at 542 F. 2d 104. The opinion of the district court (Pet. App. A-1 to A-11) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976, and a petition for rehearing was denied on August 19, 1976 (Pet. App. A-28). The petition for a writ of certiorari was filed on September 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether 18 U.S.C. 1962(c), which prohibits participation in an interstate enterprise conducted through a

pattern of racketeering activity, applies to illegal as well as to legitimate businesses.

## STATEMENT

An indictment returned in May 1975 in the United States District Court for the Eastern District of New York charged petitioner and a number of co-defendants with participating in an interstate enterprise (a gambling business) that conducted its affairs through a pattern of racketeering activity and through collection of debts, in violation of 18 U.S.C. 1962(c), and of conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d).[1] Prior to trial, petitioner moved to dismiss these counts on the ground that Section 1962 applied only to legitimate businesses conducted through racketeering methods and not to illegal businesses such as the gambling enterprise petitioner was charged with managing. The district court granted the motion (Pet. App. A-1 to A-11), but its order was reversed by the court of appeals, one judge dissenting (Pet. App. A-12 to A-26).[2]

## ARGUMENT

1. The petition for a writ of certiorari in this case should be denied as premature. Since the judgment of the court of appeals requires that the charges against petitioner under 18 U.S.C. 1962 proceed to trial, review of petitioner's contentions at this stage would be inappropriate.

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[1]Petitioner was also charged with conducting an illegal gambling business (18 U.S.C. 1955), use of interstate facilities to promote an illegal activity (18 U.S.C. 1952), obstruction of justice (18 U.S.C. 1510), and conspiracy to commit those crimes (18 U.S.C. 371).

[2]Petitioner was subsequently convicted in July 1976 of the charge, contained in the May 1975 indictment, of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. His appeal is presently pending in the Second Circuit.



*Cobbledick* v. *United States,* 309 U.S. 323. If petitioner is acquitted at trial, his legal claims would be mooted. If, on the other hand, petitioner is ultimately convicted, he will thereafter have an adequate opportunity to seek review in this Court of the court of appeals' interpretation of the statute. See, *e.g., Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 418; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 257-258.

2. In any event, petitioner's contention that Section 1962(c) applies only to legitimate businesses operated by corrupt methods is incorrect. On its face the statue broadly covers "any person" who is associated with "*any enterprise*" (emphasis added) that affects interstate commerce and is conducted "through a pattern of racketeering activity or collection of unlawful debt."[3] Similarly, "enterprise" is defined in 18 U.S.C. 1961(4) to include, without qualification, "*any individual,* partnership, corporation, association, or other legal entity, and any union *or group of individuals associated in fact* although not a legal entity" (emphasis added). In view of this unambiguous language, the courts of appeals have uniformly rejected attempts such as petitioner's to exclude businesses engaged in illegal ventures from the reach of Section 1962(c). See, *e.g., United States* v. *Cappetto,* 502 F. 2d 1351 (C.A. 7), certiorari denied, 420 U.S. 925; *United States* v. *Hawes,* 529 F. 2d 472 (C.A. 5); *United States* v. *Morris,* 532 F. 2d 436 (C.A. 5).[4]

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[3]"Racketeering activity" is defined in 18 U.S.C. 1961(1) as any act constituting certain enumerated state or federal offenses, and "pattern of racketeering activity" is defined in Section 1961(5) as consisting of two or more acts of racketeering activity.

[4]The pervasive language of Section 1962 was not inadvertent, but rather evinces a conscious legislative effort to provide a comprehensive scheme to ensnare a wide variety of major criminal activity. See *Iannelli* v. *United States,* 420 U.S. 770, 786. Thus, numerous

Although petitioner correctly adverts (Pet. 12-13) to various portions of the legislative history of Title IX that evidence Congress' intent to prevent the infiltration of normal business channels by organized crime, the recognition of this particular congressional purpose does not lead to the conclusion that Section 1962(c) was designed to apply *only* to legitimate businesses. While protection of lawful business enterprises from infiltration undoubtedly was a primary motivation for the enactment of Title IX, Congress also expressly found that organized crime received most of its financial resources from illicit activities.[5] By providing effective enforcement tools to prohibit the functioning of large-scale illegitimate enterprises, Congress sought to deny participants in such enterprises the source of income used to invest in legitimate businesses. Indeed, it would be anomalous to argue that, in drafting an apparently unrestricted definition of "enterprise," Congress did not intend to attack the source of organized crime's investment in legitimate business establishments as well as instances of actual infiltration. It is therefore not surprising that, in describing the coverage

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provisions of Title IX of the Organized Crime Control Act of 1970, 84 Stat. 941 *et seq.*, restrict or prohibit the acquisition, maintenance, or conduct of "any enterprise" through a pattern of racketeering activity. As this Court noted in *Iannelli* (*id.* at 789), the Act "is a carefully crafted piece of legislation," and efforts to impose narrowing constructions on the various sections of Title IX have proven unsuccessful. See, *e.g.*, *United States* v. *Parness*, 503 F. 2d 430 (C.A. 2), certiorari denied, 419 U.S. 1105 (contention that term "any enterprise" in Section 1962(b) excludes foreign enterprises); *United States* v. *Campanale*, 518 F. 2d 352, 364 (C.A. 9), certiorari denied *sub nom. Grancich* v. *United States*, 423 U.S. 1050 (contention that term "any enterprise" excludes small business enterprises).

[5]See, *e.g.*, Section 1 of the Organized Crime Control Act of 1970, 84 Stat. 922-923; 116 Cong. Rec. 586 (1970) (remarks of Senator McClellan).



of Title IX, the legislative reports did not purport to limit Section 1962 solely to legitimate business enterprises carried on by means of racketeering (S. Rep. No. 91-617, 91st Cong., 1st Sess. 34 (1969)):

> This title creates a new chapter in title 18, entitled "Racketeer Influenced and Corrupt Organizations," which contains a threefold standard (1) making unlawful the receipt or use of income from "racketeering activity" or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce, (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity," and (3) proscribing the operation of any enterprise engaged in interstate commerce through a "pattern" of "racketeering activity."[6]

Relying on *Rewis* v. *United States*, 401 U.S. 808, petitioner nonetheless argues (Pet. 13-15) that the interpretation of Section 1962(c) adopted by the court below threatens an unwarranted expansion of federal criminal jurisdiction. Before a person may be convicted under this statute, however, it must be established that he was engaged in significant and recurring criminal activity, *i.e.*, the enterprise involved must have been conducted through a "pattern of racketeering activity," which requires proof of the commission of at least two of the serious offenses listed in Section 1961(1), and the enterprise involved must

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[6]See H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 35 (1970). See also S. Rep. No. 91-617, *supra*, at 81, which specifically cites a case involving an injunction action brought against an illegal enterprise, namely a gambling house (*Respass & c.* v. *Commonwealth ex rel. Attorney General*, 131 Ky. 807, 812-813, 115 S.W. 1131, 1132), as an example of the utility of civil remedies available under 18 U.S.C. 1964. It is also significant that the catchline of Title IX in the United States Code is "Racketeer Influenced *and* Corrupt Organizations" (emphasis added).

have been engaged in or its activities must have affected interstate commerce.[7]

Furthermore, to the extent that Title IX represents an enlargement of federal criminal jurisdiction, that result was carefully considered by Congress, which clearly defined the terms "enterprise" and "pattern of racketeering activity" in an expansive manner with the knowledge that numerous activities previously the exclusive concern of the States would thereafter constitute federal offenses.[8] The rationale for the passage of the Organized Crime Control Act was that the States were often incapable of dealing effectively with organized criminal activities whose scope exceeded the boundaries of a single jurisdiction. Unlike in *Rewis*, where the legislative history was devoid of any indication that Congress intended to cover the conduct engaged in by the defendants (401 U.S. at 811-812), the construction given Section 1962 by the court of appeals in this case is fully in accord with this congressional purpose, and petitioner's conduct was unquestionably

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[7]The Second Circuit has enforced this requirement with particular strictness. See, *e.g.*, *United States* v. *Merolla*, 523 F. 2d 51; *United States* v. *Archer*, 486 F. 2d 670.

[8]The legislative history indicates that Congress restricted the statutory language when it feared that an overbroad definition would intrude unnecessarily into areas primarily of state concern. As originally proposed, for example, Section 1961 defined racketeering activity in regard to state offenses as "any act involving the danger of violence of life, limb or property, indictable under State * * * law and punishable by imprisonment for more than one year" (S. 1861, 91st Cong., 1st Sess. S3859 (1969)). On recommendation of the Department of Justice, the definition was ultimately rejected because it "would result in a large number of unintended applications, as well as tending toward a complete federalization of criminal justice" (S. Rep. No. 91-617, *supra*, at 121-122), and a more limited enumeration of state offenses within "racketeering activity" was adopted.



of the kind that Congress wished to prohibit.[9] The statutory interpretation urged by petitioners, however, would make the reach of Section 1962 depend not upon the substantiality, organization, or interstate character of particular racketeering activity but rather upon the type of enterprise utilized to achieve the unlawful goals.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

RICHARD L. THORNBURGH,
*Assistant Attorney General.*

JEROME M. FEIT,
ROBERT H. PLAXICO,
*Attorneys.*

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[9]Contrary to petitioner's assertion (Pet. 14), there is nothing anomalous about the fact that a defendant engaged in interstate gambling activities may be chargeable under both Section 1962(c) and 18 U.S.C. 1955. This clearly was contemplated by Congress when it included violations of Section 1955 within the definition of racketeering activity in 18 U.S.C. 1961.

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